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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 110

SEYMOUR KOMITOR,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Seymour Komitor, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered on April 8, 1968, which unanimously affirmed the order entered in the United States District Court for the Southern District of New York on October 4, 1967, denying petitioner's motion to withdraw a plea of guilty after sentence.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet reported. The decision of said Court denying petitioner's petition for rehearing (Appendix B) is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 8, 1968. A timely petition for rehearing was thereupon filed with said Court on April 18, 1968, and was denied on April 22, 1968.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Where an accused desires to stand trial but is persuaded by his attorney to change his plea to guilty and it appears that the attorney also represents the government's principal witness against the accused, was it not error for the court to accept the plea initially, and was it not "manifestly unjust" for the court subsequently to refuse to permit the accused to withdraw his plea and proceed to trial?

Statement

Petitioner, an attorney, was formerly employed by the Internal Revenue Service. In July 1966, five years after leaving the Service, he was charged with allegedly having accepted small sums of money from two accountants, Albert M. Goldstein and Sol Myers, in violation of Title 26 U.S.C. § 7214(a)(2). Petitioner pleaded not guilty. Thereafter he retained one Jacob P. Lefkowitz, Esq. as counsel.

On May 9, 1967, petitioner, accompanied by his then counsel, Mr. Lefkowitz, withdrew his plea of not guilty and pleaded guilty to Count Five of the indictment which charged him with accepting $15 from Mr. Myers on June 19,

1961, in connection with his examination of the 1960 joint income tax return of Louis and Dorothy Simon.

Before accepting petitioner's plea the Court asked him whether he would "mind telling me a little bit about what happened here? How did this come about?". Petitioner replied,

> "A. Well, your Honor, I was working in the Internal Revenue and there were many people that I dealt with, various accountants and taxpayers, and on the occasion of this charge one of the accountants with whom I had been handling—for whom I had been handling a tax matter gave me a gift of $15 because—he said it was because he wished to give me a gift.
>
> Q. You are talking about Sol Myers? A. Yes, your Honor.
>
> Q. And you knew, of course, at that time as an employee that you had no right to accept a gift from him? A. I did, your Honor."

On July 14, 1967, petitioner was sentenced to imprisonment for six months, probation for two years and a committed fine of $2500. The remaining eight counts were dismissed. On July 27, 1967, petitioner's motion for reduction of sentence was granted to the extent of making him "eligible for parole at such time as the Parole Board may determine."*

---

* The court below mistakenly considered "the six months' jail sentence being the focal point of this appeal" (p. A5 *infra*). Since petitioner's motion for reduction of sentence was granted, he would ordinarily be eligible for parole in about 60 days.

This appeal involves far more. Petitioner is fighting for his entire future. His professional life is at stake. That is why he seeks the opportunity to go to trial and establish his innocence.

The Conflict of Interest of Petitioner's Former Attorney

At the time of his plea and sentence petitioner was represented by Mr. Lefkowitz. Mr. Lefkowitz simultaneously represented Albert M. Goldstein, one of the accountants named in the indictment as the donor of the allegedly improper payments to petitioner. Mr. Goldstein was one of the government's principal witnesses against petitioner. Accordingly, if petitioner had proceeded to trial, as he originally wished, his counsel, Mr. Lefkowitz, would have been required to cross-examine his own client, Mr. Goldstein.

Mr. Lefkowitz recognized the clear conflict of interest in which he had placed himself and when petitioner said that he was innocent and wanted to go to trial, Mr. Lefkowitz told him that he also represented Goldstein and therefore could not act as petitioner's trial counsel. He stated that he would only represent petitioner on a plea of guilty (6-7).*

The district court was aware of the existence of this conflict of interest on the part of petitioner's attorney (9-10). Judge Cannella mistakenly believed, however, that the conflict was immaterial since (i) petitioner "was fully aware of it" and (ii) "I do not see any prejudice from it. I mean, suppose he was Goldstein's lawyer, where is the prejudice?" (28).

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* Numerical references in parentheses refer to pages of the minutes of the argument of appellant's motion to withdraw his plea before Hon. John Cannella, U.S.D.J., on October 4, 1967.

Petitioner's Motion to Withdraw His Plea of Guilty

Shortly after sentence, petitioner consulted new counsel and was advised for the first time that his admitted receipt of $15 from Mr. Myers, standing alone, was not *per se* an admission of a crime. Petitioner had been led to believe by Mr. Lefkowitz that the offense charged in the indictment was established upon a showing that he had received money from Mr. Goldstein and Mr. Myers irrespective of whether the gift was related to the performance of his duty. Petitioner informed his new counsel that he had not realized that the gift must have been for the performance of an official duty in order to constitute a crime; that he had not received the $15 from Mr. Myers for the performance of any such duty; and that when questioned by the Court at the time of his plea, he had not intended to state that he was guilty of receiving an illegal fee for the performance of an Internal Revenue duty.

On July 21, 1967, petitioner moved to withdraw his guilty plea. In support of his application it was urged that he had been induced to plead guilty by Mr. Lefkowitz who misled him as to the law and who was in such a conflict of interest situation as to leave petitioner in effect unrepresented by counsel. It was further urged that the conflict of interest tainted the entire proceedings relating to petitioner's plea and sentence.

Reasons for Granting the Writ

1. This Court is completely committed to the principle that an accused must have the effective assistance of counsel at every critical stage of the proceedings (*White* v. *Maryland*, 373 U.S. 59; *Gideon* v. *Wainwright*, 372 U.S. 335;

Hamilton v. *Alabama,* 368 U.S. 52). This includes the time of his plea to the indictment, for only the aid of counsel can enable "the accused to know all the defenses available to him and to plead intelligently" (*White* v. *Maryland, supra,* at p. 60).

Effective assistance, however, can only come from an attorney who is wholeheartedly committed to the cause of his client—not from one who simultaneously represents the government's principal witness. The attorney owes his entire and undivided loyalty to his client's cause. (See, ABA, Canons of Professional Ethics). As this Court so aptly stated in *Von Moltke* v. *Gillies,* 332 U.S. 708, 725-726:

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision."

Neither was it contemplated that the accused should be represented by counsel for the government's principal witness. Such representation was nothing more than "hollow compliance with the mandate of the Constitution" (*Von Moltke* v. *Gillies, supra,* at p. 723).

The district court should not have permitted petitioner to enter a plea (or to have accepted his plea) until after petitioner had the opportunity to consult with, and receive the benefit of the undivided assistance of, new counsel. Under circumstances such as those presented in the case at bar, courts are not to speculate upon the degree of preju-

dice resulting from an attorney's divided allegiance. This Court made this point clear in *Glasser* v. *United States,* 315 U.S. 60, 75-76, where it stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Glasser v. *United States, supra,* is direct authority for vacating the judgment of conviction and granting petitioner's motion to withdraw his plea. There, as in the case at bar, the appellant himself was an attorney who had retained other counsel. On the day of trial, the court appointed appellant's counsel to also represent one of the co-defendants. Appellant was aware of the conflict of interest resulting from this appointment but continued to be represented by his counsel throughout the ensuing lengthy trial. The Court reversed the conviction and ordered a new trial, holding that appellant had been denied his right to have the effective assistance of counsel.

The Court below obviously disregarded the conflict of interest situation when it described petitioner as having been "represented by competent counsel" (p. A4, *infra*).

When a lawyer gives his client an opinion, and the client, relying on that opinion, enters a plea of guilty which has disastrous consequences on his future life, it is hard to understand how it can be maintained that "manifest injustice" has not occurred if the lawyer's opinion was tainted by his conflicting allegiance to the government's principal witness.

The federal courts, following this Court's lead, have uniformly reversed or vacated convictions where it appeared that the accused might have been deprived of effective representation because his attorney was in a conflict of interest (see *e.g., Porter* v. *United States,* 298 F. 2d 461; *Tucker* v. *United States,* 235 F. 2d 238; *Craig* v. *United States,* 217 F. 2d 355; *Wright* v *Johnston,* 77 F. Supp. 687). Heeding the pronouncement of this Court in *Glasser* v. *United States, supra,* the courts have held that:

> "The prejudice to a defendant from failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused. The right 'is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' "
> (*Craig* v. *United States, supra,* at p. 359)

In *Porter* v. *United States, supra,* at p. 464, the court commented on the attorney's conflict of interest as follows:

> "Of course such things as this should never happen, and the place to stop it is the professional conscience of the advocate involved. A Court may not countenance it and must, on the contrary, take effective action just as we are certain the careful Judge below would have done had the facts been known at or before the commencement of the criminal trial. But where this has been allowed to occur, either through a calloused conscience of the attorney, or ignorance of the true facts by the Judge, the trial is not the fair one demanded by the Constitution."

Where it appears that the accused has, in effect, been deprived of his right to have the effective assistance of counsel, the court is without jurisdiction to proceed (*Wright* v. *Johnston, supra*). In the case at bar, the court should not

have accepted petitioner's plea. Having done so, it was "manifest injustice" not to permit petitioner to withdraw his plea after he consulted new counsel.

Petitioner merely seeks to exercise his "fundamental right to stand trial and to require the Government to establish the charges against him in accordance with substantive and procedural due process requirements of the Federal Constitution" (*United States* v. *Tateo*, 214 F. Supp. 560, 565). He should be given this opportunity.

2. The court below appears to have accepted the government's contention that there is something unfair or improper in petitioner's seeking to withdraw his plea of guilty after sentence. This Court should expressly declare that there is no merit to such an argument and should advise the lower courts that they should refrain from viewing defendants who seek such relief as somehow taking unfair advantage.

> "The entire administration of the criminal process runs on the principle that a defendant who pleads guilty expects more lenient treatment than if he exercised his right to a trial. Thus all guilty pleas may be considered as induced by an implicit promise of leniency. To this may be added the explicit inducements which often exist. Given these expectations which the *system* has created for its own purposes—i.e., to encourage pleas and thus avoid trials —it is not unreasonable for a defendant whose sentence has been 'unexpectedly severe' to attempt to undo it." (8 Moore, Federal Practice, p. 32-43)

3. This Court recently granted certiorari in *McCarthy* v. *United States*, F. 2d cert. granted, 36 U.S.L.W. 3411, to review the following questions: (1) Did the trial

judge's failure, before accepting guilty plea, to specifically ask the defendant if he understood the nature of the charges against him violate Fed. R. Crim. P. 11? (2) Did the District Court deny defendant his Fifth and Sixth Amendment rights by entering judgment of conviction without adequately determining that he understood the nature of the charges against him?

Similar questions are raised in the instant case. When petitioner was asked to tell the Court "a little bit about what happened here" he stated that he had received a gift of $15 from one of the accountants for whom he had been handling a tax matter. He was not asked and he did not say that this money was given to him in connection with his examination of income tax returns, as charged in the indictment. In petitioner's affidavit in support of his motion to withdraw his plea of guilty, he expressly denies that the $15 was given to him for the performance of a duty and alleges that he was misinformed and, at the time of his plea, did not understand the legal significance of his receipt of the money.

It is no answer to say, as the court below did, that petitioner had had an opportunity to talk to his counsel about the case and had related the facts to, and discussed the law with, counsel before entering his plea of guilty. Petitioner's consultation with Mr. Lefkowitz was meaningless because of the latter's conflict of interest. The Court should not have permitted petitioner to enter a plea, and should not have accepted his plea, until after petitioner had the opportunity to consult with and receive the benefit of the assistance of new counsel. At the very least, the court should have specifically inquired whether petitioner fully understood the nature of the charges against him.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 305—September Term, 1967.

(Argued January 25, 1968 Decided April 8, 1968.)

Docket No. 31869

UNITED STATES OF AMERICA,

Appellee,

—against—

SEYMOUR KOMITOR,

Appellant.

Before:

MEDINA, MOORE and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannell, *Judge,* which denied appellant's motion to withdraw a plea of guilty after sentence.

Affirmed.

JEROME LEWIS, New York, N. Y., *for appellant.*

PIERRE N. LEVAL, Assistant United States Attorney, New York, N. Y. (Robert M. Mor-

genthau, United States Attorney for the Southern District of New York, New York, N. Y., and Paul K. Rooney, Assistant United States Attorney, New York, N. Y., of counsel), *for appellee.*

PER CURIAM:

In an indictment filed on July 1, 1966, appellant was charged with nine counts of having received fees, compensations and rewards for the performance of his duties as an Internal Revenue officer in violation of 26 U. S. C. §7214(a)(2). On July 28, 1966, appellant, represented by counsel, pleaded not guilty to all counts of the indictment. Later appellant obtained the services of another attorney and on May 9, 1967, withdrew his plea of not guilty and substituted a plea of guilty to Count Five which charged appellant with accepting $15 on June 19, 1961, from an accountant in connection with the examination of a 1960 income tax return.

Before accepting the guilty plea, Judge Cannella questioned appellant about the facts and implications of his plea. In response to these questions, appellant indicated that he had consulted with his lawyer, that he understood the law, that he had not been promised anything or threatened in any way, and that he changed his plea because he felt himself to be guilty of the charge.

On July 14, 1967, appellant was sentenced by Judge Palmieri to imprisonment for six months, probation for two years, and fined $2,500. The remaining eight counts were dismissed, without objection by the government, on motion by the appellant.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

On July 21, 1967, appellant, now represented by yet another lawyer, moved before Judge Cannella to withdraw his guilty plea. This motion was denied and we affirm.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> "*Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

This court has held that permission to withdraw a plea of guilty is a matter for the sound discretion of the trial court and "is reversible only if clearly erroneous." *United States* v. *Giuliano*, 348 F. 2d 217, 221 (2d Cir. 1965); *United States* v. *Hughes*, 325 F. 2d 789, 792 (2d Cir.), *cert. denied*, 377 U. S. 907 (1964).

The government contends that appellant simply gambled on getting a suspended sentence by pleading guilty and, when he did not receive what he had expected, he preferred to take his chances with a trial. Appellant, in turn, argues, as he must, that the court should permit withdrawal of the plea "to correct manifest injustice."

Appellant claims that he had poor advice from his lawyer who represented him at the time he entered the plea of guilty; that, as he then understood the law, he assumed he was guilty merely if he received the money and did not realize that the money must be received in connection with his employment before it is a crime; that at the hearing

in which he entered the guilty plea, he admitted receiving the $15 as a "gift"; and that nowhere did he state that he received the money in connection with the performance of his duties as an Internal Revenue officer. He now maintains that the money was received "in a purely social and friendship context one day when it happened to be my birthday . . . " (Affidavit in support of the motion to withdraw the guilty plea).

However, the indictment is clear. It charges that appellant "unlawfully, wilfully and knowingly did receive a fee, compensation and reward not prescribed by law, in the amounts hereinafter set forth for the performance of a duty, to wit, the examination of income tax returns hereinafter set forth." It strains credulity to think that appellant, himself a lawyer and represented by competent counsel, could have mistakenly pleaded guilty to this charge. The plea was not made in haste. Approximately nine and one-half months elapsed between the original plea of not guilty and the hearing on the motion to change the plea to guilty. Furthermore, the minutes taken at the time of appellant's guilty plea rebut his present contentions. The court ascertained that appellant had had an opportunity to talk to his counsel about the case and had explained to him "all the facts as you understand them"; that they had discussed the law and the punishment; and that appellant was "fully armed now with all the information you need to proceed at this time." The court, delving into the facts further, gave appellant an opportunity to state his own version, thus developing the "gift" of the $15 which appellant admitted he had no right to accept and that he was doing "something wrong." Even as to the extent of the punish-

ment (the six months' jail sentence being the focal point of this appeal), there was a full understanding as to the jail consequences of the plea. At first appellant thought it might be "Ten years—two years." Then appellant remembered that it was "two years." Finally, it was discovered that both terms were wrong and that the scope of punishment was "five years and $10,000 fine." Appellant acknowledged this possibility and in answer to the court's question, "Does that change your mind in any way as to the plea that you offered?" said, "No, your Honor."

We are satisfied that there was no manifest injustice here; that the requirements of amended Rule 11 of the Rules of Criminal Procedure as disclosed in the Notes of the Advisory Committee on Rules were satisfied; and that there was clearly no abuse of discretion on the part of the court below in refusing to permit appellant to withdraw his guilty plea.

Judgment affirmed.

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SEYMOUR KOMITOR,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

It is further ordered that the motion to stay the issuance of the mandate pending a petition for a writ of certiorari to the Supreme Court of the United States is hereby granted subject to the provisions of Rule 28(c).

HAROLD R. MEDINA

LEONARD P. MOORE

ROBERT P. ANDERSON

Circuit Judges

April 22, 1968